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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity.

No. 759-S.

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY,
Plaintiff and Appellee;
UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Sureties on Bonds Filed by Plaintiff and Appellees,

vs.

RAY INGELS, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, HOWARD E. DEEMS, AS REGISTRAR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, RAY EDGAR AND RAY L. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION AND CONSTITUTING SAID BOARD IN THE STATE OF CALIFORNIA, AND E. SEYMOUR,
Defendants and Appellants.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The defendants, by their solicitors, do on this 14th day of August, 1936, at the time of filing and presenting their peti-

tion for appeal to the Supreme Court of the United States from the final decree entered in this cause by the District Court of the United States for the Southern District of California, Central Division, on the 8th day of June, 1936, file and present to the District Court this Statement that the basis of the jurisdiction of the Supreme Court to review said final decree upon appeal is the following:

(*a*) The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States are Par. (3) of Section 238, and Section 266, Judicial Code, as amended (U. S. C., Title 28, Sections 345, Par. (3), and 380).

(b) The validity of Chapter 402, Statutes of 1935 of the State of California (found on page 1453 of said Statutes of 1935 of the State of California), is involved in this cause. It is set out *verbatim* on pages four to seven of this statement.

(c) The final decree of the District Court of the United States for the Southern District of California, Central Division, sought to be reviewed was entered on June 8, 1936, and the application for this appeal was presented to the District Court on August 14, 1936, and the order of the District Court allowing this appeal was entered on said date.

Said final decree was entered by a District Court of Three Judges (one Judge dissenting), and enjoined defendants (appellants), officers of the State of California, from enforcing said chapter 402, Statutes of 1935 of the State of California, on the ground that said statute violates the Constitution of the United States.

Cases which sustain the jurisdiction of the Supreme Court are *Morf* v. *Bingaman* (United States Supreme Court, No. 772, October Term, 1935, decided May 18, 1936); *Clark* v. *Poor*, 274 U. S. 554; and *Bingaman* v. *Golden Eagle*

Western Lines (U. S. Supreme Court, No. 520, October Term, 1935, decided March 30, 1936).

The plaintiff (appellee), by his bill of complaint in equity filed in the District Court, alleged that Chapter 402, Statutes of 1935 of California, unconstitutionally violates his rights protected by the Commerce Clause of Section 8 of Article 1 of the Constitution of the United States, and by the Equal Protection of the Laws and Due Process of Law Clauses of Section One of the Fourteenth Amendment to the Constitution.

Said bill of complaint prayed that a temporary restraining order issue forthwith enjoining defendants (appellants) from enforcing said Chapter 402 against plaintiff (appellee); and prayed that order issue directed to defendants to show cause why interlocutory injunction should not issue enjoining defendants (appellants) as aforesaid; and prayed for final decree of injunction as aforesaid.

On September 25, 1935, as prayed in said bill of complaint, a temporary restraining order issued restraining defendants (appellants) from enforcing said statute against plaintiff (appellee), upon plaintiff's filing bond conditioned as required by law in the sum of $2,000.00, which was done, with United States Fidelity and Guaranty Company, a corporation, as surety thereon; an order issued directed to defendants (appellants) to show cause why an interlocutory injunction restraining them as aforesaid should not issue. Defendants (appellants) filed answer and return to said show cause order on October 22, 1935, denying plaintiff's (appellant's) claims and asserting said statute to be constitutional.

The aforesaid temporary restraining order was continued in force until entry of final decree herein, and while said order remained in force plaintiff (appellee) filed additional bonds from time to time as required in said order

with the aforesaid surety thereon, and one bond with Continental Casualty Company, a corporation, as surety.

On November 29, 1935, as prayed in said bill of complaint a District Court of three judges (Clifton Mathews, Judge of the Ninth Circuit Court of Appeals, and Albert Lee Stephens and Leon R. Yankwich, Judges of the United States District Court of the Southern District of California) was convened to hear said cause, as provided by Section 266 Judicial Code, as amended (Sec. 380, Title 28, U. S. C.), upon plaintiff's (appellee's) application for interlocutory injunction. Evidence was introduced by plaintiff and by defendants, and it was stipulated that final decree could be entered by the Court upon the record made.

On May 5, 1936, the Court, Judge Yankwich dissenting, filed its opinion holding said Chapter 402 unconstitutional. The dissenting judge filed a separate opinion. Both opinions are attached hereto.

On June 8, 1936, the Court entered its final decree, one judge dissenting, permanently enjoining defendants (appellants) from enforcing said Chapter 402 against plaintiff (appellee) and exonerating the bonds given by plaintiff (appellee) under said restraining order.

Said Chapter 402, Statutes of 1935 of California, is as follows:

CHAPTER 402, STATUTES OF 1935.

AN ACT TO REGULATE THE CARAVANING OF MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS OF THIS STATE, DEFINING THE TERM "CARAVANING" AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

(Approved by the Governor, July 6, 1935, in effect September 15, 1935.)

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the

State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

SEC. 2. No person, firm or corporation, shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent places thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

SEC. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State re-

lating to the transportation of property upon the public highways for hire shall have been complied with.

SEC. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permitee complying with all laws of the State of California and the United States.

SEC. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

SEC. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury. Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State Treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of polic-

ing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

SEC. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

The basis of plaintiff's (appellee's) complaint was that he purchases passenger automobiles in states east of California, has them driven on their own wheels from there to his place of business in Los Angeles, California, for the purpose of selling them, and there sells them; and that said Chapter 402 unconstitutionally burdens interstate commerce conducted by plaintiff (appellee), discriminates against him, and deprives him of his property without due process of law, in violation of the Commerce Clause and the Equal Protection of the Laws and Due Process of Law Clauses of the Fourteenth Amendment.

Defendants' (appellants') position is that the class defined and included in said Chapter 402 is a distinct class carrying on business on the State's highways for commercial gain in a substantially different way than any persons not included within the class; that the act does not discriminate against the class therein defined because there are no persons not included within the class who conduct operations by motor vehicle similar to the operations of the included class, either in intrastate or interstate commerce; that the act only requires the payment of a police power license fee and a charge for the use of the State's highways and such fee is reasonable in amount.

The questions involved are substantial. The enforcement of a statute deemed by the Legislature and the officials of the State to be necessary to the State's welfare is sus-

pended, and the questions of law involved were settled largely, if not entirely, in favor of the validity of said Chapter 402 by the decision of the Supreme Court of the United States in *Morf* v. *Bingaman*, decided May 18, 1936.

Respectfully submitted,

U. S. WEBB,
Attorney General of the State of California;

By FRANK RICHARDS,
Deputy Attorney General of the State of California;
Solicitors for Defendants and Appellants.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, RUSSELL BEVINS, as Registrar of the Motor Vehicle Department of the State of California, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, ORFA JEAN SHONTZ and RAY L. RILEY, as Members of the State Board of Equalization and Constituting Said Board, in the State of California, and E. SEYMOUR, *Defendants.*

Appearances:

For Plaintiff: Pierson & Block, by Ralph K. Pierson and Samuel P. Block.

For Defendants: U. S. Webb, Attorney General, by Frank Richards, Deputy Attorney General.

Before Mathews, Circuit Judge, Stephens and Yankwich, District Judges.

Opinion by STEPHENS, *District Judge:*

The plaintiff seeks to enjoin state officials from enforcing a state law which allegedly invades his rights under the Federal Constitution. Upon issue joined, the case was tried and submitted for decision in a three judge court.

For several years automobiles have been transported upon their own wheels from eastern points for sale in California. The practice increased so that automobiles, or

cars, as we shall hereafter generally refer to them, were being brought into California singly and in fleets of from three to forty. In the fleets which were commanded by experienced men there were single cars and cars that were linked together the leading one pulling the other. Up to November 29th last, about fourteen thousand cars had been rolled into the state during the year, and it is safe to say that the number exceeded fifteen thousand for the full year. The fleet movement caused certain traffic difficulties such as passing the fleet and meeting cars while passing it. The fleet would sometimes stop, affecting the flow of traffic. When motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the towed car sometimes swayed. Some of the drivers were unfamiliar with California traffic regulations and some were fatigued.

Plaintiff is a wholesale dealer of used cars with his principal place of business in Los Angeles. He sells cars for delivery in other parts of the state and a smaller number for delivery in the north Pacific states. He buys cars and brings them into California singly and by twos coupled and sometimes in fleets of several. The cars are operated directly under his supervision and responsibility and not under contract. Although he has been operating this way for several years no traffic trouble has occurred in connection with his activity. The specific complaint in this case is the demand for a license fee for driving a single car not in fleet across the California line from Arizona. Plaintiff's business is large and lucrative but it would appear that the required $15.00 license fee for each car he brings into California would practically absorb his net profit and would ruin his business. It is a serious situation for him and others in like circumstances.

The Basic Theory of National Unity and Equality of the Laws.

Preferential laws for state industries and the rivalry for foreign commerce prompted the enactment of tariffs against foreign imports between the states under the old Federa-

tion. This situation was very detrimental to national peace and unity and was one of the primary causes for the Constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States" and for the constitutional provision that Congress should have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8), and that "no state shall, without the consent of Congress, lay any duty on tonnage" (Art. I, sec. 10). Through the Fifth and the Fourteenth Amendments the Constitution has provided for the security of property and for the personal freedom from arbitrary state action under the clauses requiring due process of law and the equal protection of the laws. In many instances the states have legislated in contravention of these "equality" principles, a practice certainly to be guarded against with vigilance equal to that we should use against encroachment of national legislation upon the reserved rights of the states. Through the years the courts have met the difficult problems of construing the enacted statutes under these constitutional rules.

No nice and undeviating line has been discovered marking legislation on the one side in harmony with these constitutional provisions and on the other in conflict with them, but action has been held within a fairly narrow zone of deviation, under new and changing conditions, through the process of classification.

> "The equal protection of the law means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."
>
> *So. Ry. Co.* v. *Green*, 216 U. S. 400;
> *Darnell & Son* v. *Memphis*, 208 U. S. 113, at 120;
> *Continental Baking Co. et al.* v. *Woodring*, 286 U. S. 352.

Classification Cannot Be Sustained.

The California legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" and many other acts relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), hereunder consideration. In section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels et al., No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; actually it practically prohibited the sale of cars in California that had been registered elsewhere. We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

The term "caravan" as applied to and used in the act under consideration is a misnomer and leads to misunderstandings. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles. Fleet movement of cars may with propriety be termed caravans.

But the so-called "caravan act" although including such fleet movement of cars as hereinbefore described is by no means limited thereto. In fact it straightway defines the term "caravaning" as the movement of a single car upon its own wheels into California to be sold. There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or groups of vehicles" can be operated legally upon the highways unless spaced 150 feet. But this provision applies only to cars for sale that are rolled by highway into California upon their own wheels. There is nothing in the act indicating that the legislature has determined

that the practice of bringing cars into California for sale in this way is undesirable or that the act is intended to prevent, limit, or regulate the practice, except as to the spacing mentioned. There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications in fleet or not, to-wit, entering California upon its own wheels and being for sale.

The Supreme Court in *Darnell & Son* v. *Memphis, supra,* quoted the following from *Guy* v. *Baltimore,* 100 U. S. 434, with approval:

> "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

See also *Smith* v. *Cahoon,* 283 U. S. 553.

Most, if not all, of the cases relied upon for the validity of the Act are common carrier cases. Cases arising from the business of selling transportation upon and along the public highways. In such cases, subject to reasonableness and to the interstate commerce clauses of the Federal Constitution, the state denies, permits, regulates, and licenses such businesses. The permits issued and license fees paid are for continuing operation. The vehicles used are usually large and heavy, burdening the road and its roadbed. The difference is obvious between such cases and the instant one, where only ordinary automobiles for which the high-

ways were primarily constructed are transported ove
but a few miles of highway and for but a few days (usuall
not a whole day), under the license permit. Expression
in opinions of courts must be read accordingly. It mus
always be borne in mind that plaintiff is not a common car
rier, accepts no article for transportation for hire, an
transports only his own property. It would appear tha
plaintiff has as good a right to the free use of the highway
as anyone else transporting his own goods; subject o
course to such police regulation as is reasonable in the cir
cumstances, including a reasonable inspection fee unde
proper classification. The basic theory of the Act, tha
such use of the highways brings the principles of trans
portation for hire into play, is erroneous. Taxes on busses
truck lines, etc., are based upon privileges granted, bu
plaintiff need not ask the privilege of using the highways
He has an equal right thereto with the general public. Se
Packard v. *Banton*, 264 U. S. 140; also *Buck* v. *Kuykendall*
267 U. S. 307, at 314.

There is no doubt that classification to be legal need no
approximate perfection and as said in *Patisone* v. *Pennsyl
vania*, 232 U. S. 138, the legislature "may direct its law
against what it deems the evil as it actually exists withou
covering the whole field of possible abuses." There ar
single and fleet movements of cars for sale from point t
point within the state, and there are other instances o
troublesome use of the highways in the State of Californi
as well as across the state lines. Instance the grouping o
large vision obscuring trucks with trailers, the practice o
hauling from three to five automobiles upon one long truc
and trailer, and the trailer living quarters so greatly on th
increase. Under the doctrine expressed in the Patison
case, such instances do not necessarily invalidate a classifi
cation. They are eloquent however of the fact that th
defining elements of the Caravan Act classification are no
elements of the wrong aimed at and do not gather togethe
the common malfactors but do arbitrarily and unreasonably
embrace innocent actors. It should be noticed that the Ac
extends its burdens to singly driven cars that do not ad
any specific police burden. These cars come into sales com
petition with cars driven wholly within the state for sale

The License Fee of $15.00 *Per Car is Arbitrarily Fixed and Unreasonable in Amount.*

The purpose of assessing a fee for each car admitted, expressed in the Act, is to defray the expenses of adequately policing the highways where used in this importing practice, together with the administrative expense of the Act. The full sum collected goes into the general state fund. It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax. But aside from that there is no basis in the act for a highway tax. As to purposes of fee, see: *Interstate Transit Inc.* v. *Lindsey,* 283 U. S. 183; *Kane* v. *New Jersey,* 242 U. S. 160; *Sprout* v. *South Bend,* 277 U. S. 163, at 170 and 171; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245.

There is a provision of the act to the effect that the licensing fee of $15.00 per car is in lieu of all other fees, but this is meaningless. It merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in his circumstances. The purchaser of the imported car must pay the regular state automobile license fee and must pay the property taxes placed upon the car in the same manner as upon any other car and to the same extent. The $15.00 fee cannot be bolstered into reasonableness through recital in the act of unreal benefits to the licensee.

Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special permit hereinbefore mentioned nor that he is compelled against his will and against the facts obtaining, to assume the status of a common carrier or a carrier for hire (California Carriers' Act.) The so-called Caravan Act itself excludes such fee and if the law attempts to fix upon plaintiff a status not justified by the facts, it goes beyond the

power of the legislature and is to that extent void as to him. *Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583. It does not affect the other part of the statute, however, and is severable. For the theory of levying tax on vehicles using highways see *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Mallory* v. *Alabama*, 296 U. S. 261; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245.

We have examined the California Carriers' Act (c. 223, Stat. 1935) and find that it does not affect plaintiff in any but in the most incidental and inconsequential manner, if at all.

We come directly to the reasonableness of the license fee. As shown by the evidence in this case, during the year 1935 a great increase of automobile use of the highways occurred and for that year at least 15,000 cars were brought into the state for sale. The mileage for such cars within the state and the operation upon the highways under the permit is, of course, very little. They go only to the market place. The increased personnel of motor policemen along the routes used by these fleets, for care of all traffic conditions during 1935 up to date of hearing, amounted to but six, although a few more could be used handily. The salary of such officer averages around $200.00 per month. A few inspectors at the border offices have been put on since the passage of the law and there is some clerical expense. Even if the whole increase of expense just indicated were charged to "caravaning" it would seem mathematically demonstrable that the figure of $15.00 per each imported car was not fixed upon any basis of compensating the state for policing and for administering the act. The evidence would indicate that ten additional employees would more than take care of the situation, including the generally increased traffic. Allowing $200.00 per month each, the sum would amount to $2,400.00 or for ten men $24,000.00 per year. Fifteen thousand cars at $15.00 per car would produce $225,000. Or looking at it in another way the distance from border point to point of destination can be traversed in less than a day. The $30.00 charge for each operating unit of two cars would pay for a special police patrol and even under such regulation a great profit

would result. Of course, there is no contention that such a service is required. There can be no doubt but that the license fee is excessive and arbitrary.

The Deputy Attorney General argues that the highways belong to the people and that their use for commercial purposes can be charged for and he sought to show comparative railway charges for transporting automobiles. But this evidence has no materiality here. If the charge of $15.00 is intended as an equalization of transportation costs between railroads and highways, it rests upon an unsupportable premise.

The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state. The charge bears no reasonable relation to the purposes for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome. *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183; *Young's Market Co.* v. *Board of Equalization*, 12 Fed. Supp. 140, and cited authorities.

The clear statement of principles in *Baldwin* v. *Seelig*, 294 U. S. 511, at 521, 523, inclusive, may be related to the instant case. Mr. Justice Cardozo likens the attempt by the New York Legislature to fix milk producers' prices in Vermont on a par with those of New York, as a condition of its sale in New York, to customs duties. He says, "Such a power, if exerted, will set a barrier to traffic between one state and another, as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state: 'Except what may be absolutely necessary for executing its inspection laws. * * *' Constitution, Article I, Section 10, clause 2: * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91; 112;"

To burden the movement of plaintiff's own property with a substantial tax, when that sum bears no reasonable rela-

tion to the express use of and cause of the levy, constitutes nothing less than customs duty. To declare such tax legal as an exception would, to use the apt words of the Justice above quoted, "be to eat up the rule under the guise of an exception." Other cases of interest by analogy are *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78; *Webber* v. *Virginia*, 103 U. S. 344.

The state cannot exact an arbitrary toll for revenue from any class of highway users. *Interstate Transit Inc.* v. *Lindsey, supra; Sprout* v. *City of South Bend*, 277 U. S. 169.

Judgment will go for plaintiff. A permanent injunction will issue and the bonds given under the temporary restraining order will be exonerated.

Dated May 5th, 1936.

CLIFTON MATHEWS,
Circuit Judge.

ALBERT LEE STEPHENS,
District Judge.

(Not Signed) LEON R. YANKWICH,
District Judge.

(Indorsed:) Filed May 5, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, RUSSELL BEVINS, as Registrar of the Motor Vehicle Department of the State of California, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, ORFA JEAN SHONTZ and RAY L. RILEY, as Members of the State Board of Equalization and Constituting Said Board, in the State of California, and E. SEYMOUR, *Defendants.*

Amended Opinion.

APPEARANCES:

For Plaintiff: Pierson & Block, by Ralph K. Pierson and Samuel P. Block.

For Defendants: U. S. Webb, Attorney General, by Frank Richards, Deputy Attorney General.

Before Mathews, Circuit Judge, Stephens and Yankwich, District Judges.

Opinion by STEPHENS, *District Judge:*

The plaintiff seeks to enjoin state officials from enforcing a state law which allegedly invades his rights under the Federal Constitution. Upon issue joined, the case was tried and submitted for decision in a three judge court.

For several years automobiles have been transported upon their own wheels from eastern points for sale in

California. The practice increased so that automobiles, or cars, as we shall hereafter generally refer to them, were being brought into California singly and in fleets of from three to forty. In the fleets which were commanded by experienced men there were single cars and cars that were linked together, the leading one pulling the other. Up to November 29th last, about fourteen thousand cars had been rolled into the state during the year, and it is safe to say that the number exceeded fifteen thousand for the full year. The fleet movement where made up of more than four automobiles caused certain traffic difficulties such as passing the fleet and meeting cars while passing it. The fleet would sometimes stop, affecting the flow of traffic. When motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the towed car sometimes swayed. Some of the drivers were unfamiliar with California traffic regulations and some were fatigued.

Plaintiff is a wholesale dealer of used cars with his principal place of business in Los Angeles. He sells cars for delivery in other parts of the state and a smaller number for delivery in the north Pacific states. He buys cars and brings them into California singly and by twos coupled and sometimes in fleets of several. The cars are operated directly under his supervision and responsibility and not under contract. Although he has been operating this way for several years no traffic trouble has occurred in connection with his activity. The specific complaints in this case are, first, the demand for a license fee for driving a single car not in fleet across the California line from Arizona, and, second, demands for license fees for so driving a car with another car attached. Between 30% and 40% of such imported cars are driven to and across the California state line singly and not in company with other automobiles. Plaintiff's business is large and lucrative but it would appear that the required $15.00 license fee for each car he brings into California would practically absorb his net profit and would ruin his business. It is a serious situation for him and others in like circumstances.

The Basic Theory of National Unity and Equality of the Laws.

Preferential laws for state industries and the rivalry for foreign commerce prompted the enactment of tariffs against foreign imports between the states under the old Federation. The situation was very detrimental to national peace and unity and was one of the primary causes for the Constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States" and for the constitutional provision that Congress should have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8), and that "no state shall, without the consent of Congress, lay any duty on tonnage" (Art. I, sec. 10). Through the Fifth and the Fourteenth Amendments the Constitution has provided for the security of property and for the personal freedom from arbitrary state action under the clauses requiring due process of law and the equal protection of the laws. In many instances the states have legislated in contravention of these "equality" principles, a practice certainly to be guarded against with vigilance equal to that we should use against encroachment of national legislation upon the reserved rights of the states. Through the years the courts have met the difficult problems of construing the enacted statutes under these constitutional rules.

No nice and undeviating line has been discovered marking legislation on the one side in harmony with these constitutional provisions and on the other in conflict with them, but action has been held within a fairly narrow zone of deviation, under new and changing conditions, through the process of classification.

> "The equal protection of the law means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real

and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."

So. Ry. v. *Greene*, 216 U. S. 400;
Darnell & Son v. *Memphis*, 208 U. S. 113, at 120;
Continental Baking Co. et al. v. *Woodring*, 286 U. S. 352.

Classification Cannot be Sustained.

The California legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" (St. 1935, p. 93) and many other acts relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), hereunder consideration. In section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels et al., No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; actually it practically prohibited the sale of cars in California that had been registered elsewhere. We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

The term "caravan" as applied to and used in the act under consideration is a misnomer and leads to misunderstandings. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles. Fleet movement of cars may with propriety be termed caravans.

But the so-called "caravan act" although including such fleet movement of cars as hereinbefore described is by no means limited thereto. In fact it straightway defines

the term "caravaning" as the movement of a single car upon its own wheels into California to be sold. There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or groups of vehicles" can be operated legally upon the highways unless spaced 150 feet. But this provision applies only to cars for sale that are rolled by highway into California upon their own wheels. There is nothing in the act indicating that the legislature has determined that the practice of bringing cars into California for sale in this way is undesirable or that the act is intended to prevent, limit, or regulate the practice, except as to the spacing mentioned. There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications, in fleet or not, to-wit, entering California upon its own wheels and being for sale.

The Supreme Court in *Darnell & Son* v. *Memphis, supra*, quoted the following from *Guy* v. *Baltimore*, 100 U. S. 434, with approval:

> "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

See also *Smith* v. *Cahoon*, 283 U. S. 553.

Most, if not all, of the cases relied upon for the validity of the Act are common carrier cases. Cases arising from

the business of selling transportation upon and along the public highways. In such cases, subject to reasonableness and to the interstate commerce clauses of the Federal Constitution, the state denies, permits, regulates, and licenses such businesses. The permits issued and license fees paid are for continuing operation. The vehicles used are usually large and heavy, burdening the road and its roadbed. The difference is obvious between such cases and the instant one, where only ordinary automobiles for which the highways were primarily constructed are transported over but a few miles of highway and for but a few days (usually not a whole day), under the license permit. Expressions in opinions of courts must be read accordingly. It must always be borne in mind that plaintiff is not a common carrier, accepts no article for transportation for hire, and transports only his own property. It would appear that plaintiff has as good a right to the use of the highways as anyone else transporting his own goods; subject, of course, to such police regulation as is reasonable in the circumstances. See *Packard* v. *Banton*, 264 U. S. 140; also *Buck* v. *Kuykendall*, 267 U. S. 307, at 314.

There is no doubt that classification to be legal need not approximate perfection and as said in *Patoine* v. *Pennsylvania*, 232 U. S. 138, the legislature "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." There are single and fleet movements of cars for sale from point to point within the state, and there are other instances of troublesome use of the highways in the State of California as well as across the state lines. Instance the grouping of large vision obscuring trucks with trailers, the practice of hauling from three to five automobiles upon one lock truck and trailer, and the trailer living quarters so greatly on the increase. Under the doctrine expressed in the Patisone case, such instances do not necessarily invalidate a classification. They are eloquent however of the fact that the definifg elements of the Caravan Act classification are not elements of the wrong aimed at and do not gather together the common malfactors but do arbitrarily and unreasonably embrace innocent actors. It should be noticed

that the Act extends its burdens to singly driven cars and *too* cars coupled together that do not add any specific police burden. These cars come into sales competition with cars driven wholly within the state for sale.

The License Fee of $15.00 Per Car is Arbitrarily Fixed and Unreasonable in Amount.

The purpose of assessing a fee for each car admitted, expressed in the Act, is to defray the expenses of adequately policing the highways where used in this importing practice, together with the administrative expense of the Act. The full sum collected goes into the general state fund. It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax under the act for other than such extra policing reasonably required by fleet movement. But aside from that there is no basis in the act upon which a highway tax can be estimated or calculated. As to purposes of fee, see: *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Kane* v. *New Jersey*, 242 U. S. 160; *Sprout* v. *South Bend*, 277 U. S. 163, at 170 and 171; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245.

There is a provision of the act to the effect that the licensing fee of $15.00 per car is in lieu of all other fees, but this is meaningless. It merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in his circumstances. The purchaser of the imported car must pay the regular state automobile license fees and must pay the property taxes placed upon the car in the same manner as upon any other car and to the same extent. The $15.00 fee cannot be bolstered into reasonableness through recital in the act of unreal benefits to the licensee.

Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special permit

hereinbefore mentioned nor that he is compelled agains his will and against the facts obtaining, to assume the statu of a common carrier or a carrier for hire (California Ca riers' Act). The so-called Caravan Act itself excludes suc fee and if the law attempts to fix upon plaintiff a status no justified by the facts, it goes beyond the power of the legis lature and is to that extent void as to him. *Frost Truck ing Co.* v. *R. R. Comm.*, 271 U. S. 583. It does not affect th other part of the statute, however, and is severable. Fo the theory of levying tax on vehicles using highways se *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Mallory* v *Alabama*, 296 U. S. 261; *Interstate Busses Corp.* v. *Blod gett*, 276 U. S. 245.

We have examined the California Carrier's Act (c. 223 Stat. 1935) and find that it does not affect plaintiff in an but in the most incidental and inconsequential manner, i at all.

We come directly to the reasonableness of the license fee As shown by the evidence in this case, during the year 193 a great increase of automobile use of the highways oc curred and for that year at least 15,000 cars were brough into the state for sale under conditions hereinabove recited The mileage for such cars within the state and the opera tion upon the highways under the permit is, of course, ver little. They go only to the market place. The increase personnel of motor policemen along the routes used b these fleets, for care of all traffic conditions during 1935 u to date of hearing, amounted to but six, although a few more could be used handily. The salary of such office averages around $200.00 per month. A few inspectors a the border offices have been put on since the passage of th law and there is some clerical expense. Even if the whol increase of expense just indicated were charged to "cara vaning" it would seem mathematically demonstrable tha the figure of $15.00 per each imported car was not fixe upon any basis of compensating the state for policing an for administering the act. The evidence would indicat that ten additional employees would more than take care o the situation, including the generally increased traffic. Al lowing $200.00 per month each, the sum would amount t

$2,400.00, or for ten men $24,000.00, per year. Fifteen thousand cars at $15.00 per car would produce $225,000.00. Or looking at it in another way, the distance from border point to point of destination can be traversed in less than a day. The $30.00 charge for each operating unit of two cars would pay for a special police patrol, and even under such regulations a great profit would result. Of course, there is no contention that such a service is required. There can be no doubt but that the license fee is excessive and arbitrary.

The Deputy Attorney General argues that the highways belong to the people and that their use for commercial purposes can be charged for and he sought to show comparative railway charges for transporting automobiles. But this evidence has no materiality here. If the charge of $15.00 is intended as an equalization of transportation costs between railroads and highways, it rests upon an unsupportable premise.

The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state. The charge bears no reasonable relation to the purposes for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome. *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Young's Market Co.* v. *Board of Equalization*, 12 Fed. Supp. 140 and cited authorities.

The clear statement of principles in *Baldwin* v. *Seelig*, 294 U. S. 511, at 521, 523 inclusive, may be related to the instant case Mr. Justice Cardozo likens the attempt by the New York Legislature to fix milk producers' prices in Vermont on a par with those of New York, as a condition of its sale in New York, to customs duties. He says, "Such a power, if exerted, will set a barrier to traffic between one state and another, as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the constitution, beyond the power of a state, 'Except what may be absolutely necessary for executing its inspection laws.'

Constitution, Article I, Section 10, clause 2: * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; 112;"

To burden the movement of plaintiff's own property with a substantial tax, when that sum bears no reasonable relation to the express use of and cause of the levy, constitutes nothing less than a customs duty. To declare such tax legal as an exception would, to use the apt words of the Justice above quoted, "be to eat up the rule under the guise of an exception." Other cases of interest by analogy are *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78; *Webber* v. *Virginia*, 103 U. S. 344.

The state cannot exact an arbitrary toll for revenue from any class of highway users. *Interstate Transit Inc.* v. *Lindsey, supra; Sprout* v. *City of South Bend*, 277 U. S. 169.

Judgment will go for plaintiff. A permanent injunction will issue and the bonds given under the temporary restraining order will be exonerated.

Dated May 5th, 1936.

CLIFTON MATHEWS,
Circuit Judge.
ALBERT LEE STEPHENS,
District Judge.
(Not Signed) LEON R. YANKWICH,
District Judge.

(Indorsed:) Filed Jun. 5, 1936. R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

Dissenting Opinion.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, *et al., Defendants.*

YANKWICH, *District Judge:*

I dissent.

The main opinion admits that caravaning of automobiles from other states to California has been so extensive as to create a problem. But it denies validity to the California Caravan Act (Statutes of 1935, Chap. 40, California Vehicle Code pp. 174-176) for three reasons: (1) That the classification is arbitrary, in that it does not apply to what is strictly speaking caravaning, i. e., fleet movements of cars on their own wheels, but includes a single car transported from without the state of California, (as the enactment provides) "on its own wheels, or in tow of another motor vehicle for sale." (2) That it is, in reality, a protective tariff against automobiles transported for sale from without the State of California, and thus violative of the commerce clause of the Constitution of the United States (*Constitution of the United States,* Article I, Section 8) and (3) that the amount of the fee charged for each caravaned automobile is excessive and arbitrary and has no relation to the cost of the added burden upon the state traffic, which might justify the regulation, and is thus violative of the due process and equal protection clauses of the Constitution. (*Constitution of the United States,* 14th Amend-

ment, Section 1.) Because of the importance of the mat
ter, I state the reasons for my dissent fully. Of necessity
the questions are inter-related. So to a certain extent th
principles involved must be treated together.

The power of the Congress to regulate commerce be
tween the states is exclusive and plenary, and is not sub
ject to any state restrictions, burdens or limitations
(*Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 70; *University o*
Illinois v. *United States* (1933), 289 U. S. 48.) No stat
may, through the exercise of the taxing or police powers
establish an economic barrier between the states. (*Bald*
win v. *G. A. F. Seelig, Inc.* (1935), 294 U. S. 511; *Bingama*
v. *Golden Eagle Western Lines, Inc.* (1936), 80 L. Ed. pag
600. However, a state may, in the exercise of its reserve
power to regulate intrastate commerce, adopt measure
and regulations which affect interstate commerce *indirectly*
and incidentally only, or the persons engaged in it. I
such regulations do not impede the free flow of commerce
they will be given validity. (See *Boston and Maine Rail*
road Company v. *Armbury* (1932), 285 U. S. 234; *Clyde*
Mallory Lines v. *Alabama* (1935), 80 L. Ed. 191.) So stat
utes which impose a charge for the use of the highways and
facilities of a state by residents of other states or inter
state carriers have been sustained. The limits of the exer
cise of this power have been stated by Mr. Justice Brandei
in *Interstate Transit* v. *Lindsey* (1931), 233 U. S. 183, 185

> "While a state may not lay a tax on the privilege o
> engaging in interstate commerce (Sprout *v.* South
> Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S
> Ct. 502), it may impose even upon motor vehicles en
> gaged exclusively in interstate commerce a charge, a
> compensation for the use of the public highways, whic
> is a fair contribution to the cost of constructing and
> maintaining them and of regulating the traffic thereo
> (Kane *v.* New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed
> 222, 227, 228, 37 S. Ct. 30; Clark *v.* Poor, 274 U. S. 554
> 71 L. Ed. 1199, 47 S. Ct. 702; Sprout *v.* South Bend
> *supra* (277 U. S. 169, 170, 72 L. Ed. 836, 837, 62 A. L. R
> 45, 48 S. Ct. 502). As such a charge is a direct burde
> on interstate commerce, the tax cannot be sustained

unless it appears affirmatively, in some way, that *it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.* This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark *v.* Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. Where it is shown that the tax is so imposed, *it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.*" (Italics added.)

Some cases intimate that the tax is considered as mere compensation for the damage done to the roads by the driving of automobiles and is based primarily upon the amount of destruction caused by them. (*Kane* v. *New Jersey* (1911), 81 N. J. L. 594, 80 Atl. 453.) Notwithstanding this, courts have left it to the legislatures of the various states to determine the form which the exaction should take. Thus (even in the case of interstate commerce carriers) it may take the form of a fee (*Kane* v. *New Jersey* (1916), 242 U. S. 160) or of a mileage tax, despite the fact that by the law of the particular state carriers of intrastate commerce are taxed upon the basis of gross receipts. (See *Interstate Busses Corporation* v. *Blodgett* (1928), 276 U. S. 245.) Nor does the fact that such a tax imposed directly upon an interstate carrier may be in addition to an annual license fee demanded of all persons using automobiles, make the fee a discriminatory exaction violative of the commerce clause. (See *Clark* v. *Poor* (1927), 274 U. S. 554; *Interstate Busses Corporation* v. *Blodgett*, *supra*; *American Motor Coach System* v. *City of Philadelphia* (1928), (C. C. A. 3) 28 Fed. (2) 736; *Liberty Highway Company* v. *Michigan Public Utilities Commission* (1923), D. C. 294 Fed. 703.) Indicative of the recent trend of the Supreme Court to sustain local impositions or regulations despite their incidental effect upon interstate commerce is *Clyde Mallory Lines* v. *Alabama* (1935), 296 U. S. 261.

Despite the constitutional inhibition against the levying of duties on tonnage by the states of confederation of the United States, Article I, Section 10, Clause 3, the Court there sustained a flat harbor fee of $1.00 for vessels of 300 tons and over entering the harbor of Mobile, saying:

> "And charges levied by state authority, to defray the cost of regulating or of facilities afforded to aid of interstate or foreign commerce have consistently been held to be permissible . . ." (Clyde Mallory Lines v. Alabama, supra, at page 76.)

In the course of control of harbors, the basis and limits of allowable boundary of power . . . (See . . . at page . . .)

> The harbor is a public prospect. . . . Use of them . . . for . . . interstate . . . by the State to secure safety . . . and the preservation of the harbor . . . Morris . . . Duncan, supra, p. 170, Thorpe v. Rutland . . . Cases of them, although engaged exclusively in interstate commerce, may be required to contribute . . . common . . . for . . . the . . . harbor . . . Maryland, 76 U. S. 460, Lange v. Jew for Sale, 94 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144.

There is no suggestion that the tax discriminates against interstate commerce. It is not suggested that the tax is so far in excess to obstruct interstate commerce. It is said that all of the tax is used for maintenance . . . of the harbor, that one of it is used for . . . the purpose of the Commission or the administration . . . enforcement of the Act, and one for . . . purposes. This, if true, is immaterial. Since the . . . is collected for a proper purpose and is not . . . amount, the use to which the proceeds . . . is a matter which concerns the plaintiffs." (Italics added.)

being collected as to shock, (as was the case in *Interstate Transit* v. *Lindsey, supra,* and *Prouty* v. *Coyne* (1932 D. C. S. D.), 55 Fed. (2) 289; and see *Young's Market Co.* v. *Board of Equalization* (1935 D. C. Cal.), 12 Fed. Sup. 140) and it was clear to the court that the enactments were, in reality, *revenue statutes aiming to tax the right to carry on interstate business.* But these very cases speak for the validity of a reasonable exaction, without requiring demonstration that the amount is just what is necessary to compensate the state for the use and upkeep of the highways. (See *Gundling* v. *Chicago* (1900), 177 U. S. 183.) As is said in *Interstate Transit* v. *Lindsay, supra,* at page 190:

> "Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed *represents merely a fair compensation for the use of their highways.*" (Italics added.)

The services of the state in allowing its highways to be used and in policing them are none the less a service which benefits all (*including the plaintiff*) because, in certain instances, the benefit *may* be greater to other persons than to him. (See *Clyde Mallory Lines* v. *Alabama, supra,* at page 194; *Aero Transit Co.* v. *Georgia Commission* (1933), 295 U. S. 285.) Few cases exist where the exercise of valid power has been nullified by the mere excessiveness of an impost. As said in *A. Magnano Co.* v. *Hamilton* (1934), 292 U. S. 40, at page 47:

> "If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single *premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business,* a premise which, standing alone, *this court heretofore has uniformly rejected as fur-*

nishing no juridical ground for striking down a taxing act." (Italics added.)

In dealing with the subject of classification, in the exercise of the police power, it is well to bear in mind that it is impossible to achieve absolute equality. Nor is such equality necessary in order to insure constitutional validity under the due process and equal protection of law clauses of the 14th Amendment to the Constitution. As said by Mr. Justice Holmes, in *Patsone* v. *Pennsylvania* (1914), 232 U. S. 138, in an oft-quoted passage:

> "*A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.*" (Italics added.)

(See also *Radice* v. *New York* (1924), 264 U. S. 292; *McCary* v. *United States* (1904), 195 U. S. 27; *Rast* v. *Van Denman* (1916), 240 U. S. 343, 357; *Miller* v. *Wilson* (1915), 236 U. S. 373, 383; *Heisler* v. *Thomas Colliery* (1922), 260 U. S. 245; *Quaker City Cab Co.* v. *Pennsylvania* (1928), 277 U. S. 389; *New York ex rel. Bryant* v. *Zimmerman* (1928), 278 U. S. 64; *Fox* v. *Standard Oil Co.* (1934), 294 U. S. 87; *A. Magnano Co.* v. *Hamilton* (1934), 292 U. S. 40; *In re Miller* (1912), 162 Cal. 675; *Miller* v. *Board of Public Works* (1925), 195 Cal. 477; *Graham* v. *Kingswel* (1933), 218 Cal. 658.) These cases show that, in interpreting the exercise of the police or taxing powers, courts have not sought to bind legislative bodies to an abstract or unrealizable ideal of equality. They have insisted merely that there be a reasonable foundation for the classification. When satisfied of its existence, they have sustained it. (See *St. Louis R. R. Co.* v. *Paul* (1899), 174 U. S. 404; *Petit* v. *Minnesota* (1900), 177 U. S. 164, 168; *Williams* v. *Fears* (1900), 179 U. S. 270, 275; *Knoxville Iron Co.* v. *Harrison* (1901), 185 U. S. 14; *Boxley* v. *McLaughlin* (1915), 236 U. S. 385; *Gregg*

Dyeing Co. v. Query (1932), 286 U. S. 472; *Hicklin* v. *Coney* (1933), 290 U. S. 169; *Nebbia* v. *New York* (1935), 291 U. S. 502; *Bordens Farm Products* v. *Ten Eyck* (1936), 80 L. Ed. 469.) A study of these and other cases warrants the following conclusion: If a legislature may, for regulatory purposes, distinguish between barber shop employment and other kinds of labor (*Petit* v. *Minnesota, supra*), or between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a State and persons engaged in the business of hiring for labor within the State (*Williams* v. *Fears, supra*), or exclude chambermaids in rooming and lodging houses or women performers in certain places from the provisions of laws regulating the hours of labor of women (*Miller* v. *Wilson, supra; In re Miller, supra; Radice* v. *New York, supra*), or regulate the hours of labor of pharmacists and student nurses and exclude graduate nurses (*Bosley* v. *McLaughlin, supra*) or the manner of payment of wages of employes in certain industries only (*St. Louis R. R. Co.* v. *Paul, supra*), if a product, like oleomargarine, may be selected for special taxation so as to discourage its use, in favor of butter (*A. Magnano Co.* v. *Hamilton, supra*) if a legislature may require disclosure of the by-laws and membership of one group of oath-requiring association (*like the Ku-Klux Klan*), and not require it of others (*like labor unions, or other fraternal organizations*) (*New York ex rel. Bryant* v. *Zimmerman, supra*), if an automobile licensing and tax scheme may exclude automobiles of farmers or others from the exaction (*Aero Transit Company* v. *Georgia Commission* (1935), 295 U. S. 285; *Hicklin* v. *Coney, supra*), if, in the enforcement of an industrial regulatory measure, an administrative body may apply different rules as to price as between well-advertised dealers and independents, giving a differential to one group and not to the other (*Borden's Farm Products* v. *Ten Eyck, supra*), a classification which, so far as known includes the whole class, should not be stricken down, merely because of the possibility that it might result in inequality in some individual case. There is no evidence in the record that there is any caravaning within the state. And while it is true that, occasionally, a car may be moved on its own

wheels for the purpose of sale within the state, this fact does not militate against the validity of the classification. Such car, of necessity, would have a California registration and would be moved by employes of the owner or of the buyer and would present none of the dangers of out-of-state transportation. So we have a reasonable factual basis for the classification. (See *Piper* v. *Bingaman* (1935) (D. C. N. Mex.), 12 Fed. Sup. 755.)

> "Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be 'purely arbitrary, oppressive or capricious.' American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 92. *But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution must be 'actually and palpably unreasonable and arbitrary.'* Arkansas Natural Gas Co. *v.* Railroad Commission, 261 U. S. 379, 384, and cases cited." (*Radice* v. *New York, supra*, at page 296).

In assaying the classification under discussion, it is well to advert to some of the facts testified to at the hearing which were also before the legislators during the deliberations on the bill. The practice has grown up in the last few years of moving automobiles on their own wheels over the public highways of California to their place of sale. The movement is accomplished by fleets of cars of from eight to thirty or more cars, most of them joined in tandem with two cars driven by one driver. California is a large state with great distances. The caravaning of automobiles has increased traffic hazards, and resulted in many law violations and abuses. The abuses were found to exist only among persons who moved cars on their own wheels from without the state for the purpose of sale. To particularize the conditions and some of the abuses: The automobiles are moved in fleets by the tandem-towing method. Usually, there is no tail light on the towed car. The con-

trol of the two cars comes from the brakes of the first car. So the towed car may swing or skid or fail to follow the towed car on curves. The driver of the towing car has no clear back vision. The movement in fleets makes it difficult to pass caravans moving on the highway. When, as one officer testified, there is trouble and the caravan is halted, a traffic hazard arises. Many stolen and cars with fraudulent registrations are brought in in this manner. The type of drivers employed complicates the problem. They are usually persons without any permanent residence or visible means of support, driving the car not as an occupation, but merely for the purpose of obtaining transportation to California. They do not know the traffic laws of California. Conformance means nothing to them because once the state is reached, their objective has been attained, the El Dorado has been reached. Because these persons have no opermanent residence, giving them a summons to appear means nothing. In many instances, as the testimony showed, the persons cannot, later, be found. The only other alternative, that of arresting them for violation, makes confusion worse confounded. The officer must leave his place on the highway and take the offender before a magistrate. They drive long hours. Many of them have no places to sleep other than in the cars. They become fatigued and careless. All these facts are very important factors in the happening of accidents. Many of the cars so moved have foreign license plates. Without the Caravan Act, they could move over the highways of the state without registration and without identification. These facts present a serious evil with which the California Legislature sought to deal. The evil was of recent origin. There were no legislative precedents for any other method of combating it. The Legislature sought to remedy it by making a charge for the use of its highways for commercial purposes by persons caravaning automobiles. It defined caravaning as "the transportation from without the State of *any motor vehicle* operated on its own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser, or prospective pur-

chaser who may be located within or without this state". (Section 1, Statutes of 1935, Chapter 402, California Vehicle Code (1935), pages 174-175.) Had the Legislature sought to exclude single cars operated on their own wheels or units of one towed car, and confined the enactment to fleets of cars, such a classification might have been more difficult to defend than the present one. This because it might have been shown that all these cars originating out of the state caused the same difficulties, irrespective of the size of the caravan. So the Legislature included *the whole class* which experience had shown brought on the particular evil.

Ours is the duty to stay arbitrary power in legislative action. This duty, however, we must perform in the light of the doctrine laid down by Mr. Justice Roberts in *Bordens' Farm Products* v. *Ten Eyck, supra,* at page 473:

> *Judicial inquiry does not concern itself with the accuracy of legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."* (Italics added.)

In dealing with the exercise of the police power, fairly debatable questions as to "its reasonableness, wisdom and propriety are not for the determination of courts". (*Standard Oil Company* v. *Marysville* (1929), 279 U. S. 582, at 584.) Granted that the operation of the enactment may work to the advantage of the dealers in second hand automobiles who purchase automobiles within the State, it is not a constitutional objection to the exercise of the police power of a State that it may foster the development of one form of business and restrict another. (*Fox* v. *Standard Oil Co.* (1934), 294 U. S. 871; *Sproles* v. *Binford* (1932), 286 U. S. 374; *Aero Interstate Co.* v. *Georgia Commission, supra; Hicklin* v. *Coney, supra.*)

To my way of thinking, the Act contains no discrimination between interstate and intrastate commerce. Nor between persons engaged in the same business and operating the same or similar types of vehicles. The Act aims to cover only one group shown to exist—a group residing within the State, endeavoring to use the highways of the State for the purpose of caravaning vehicles originating

out of the State for sale. There is no evidence to show there are any caravans originating within the State operating either between various points within the State or going out of the State. The only Caravaning within the State testified to at the trial was caravaning of automobiles originating outside of the State, in their course, between various points within the State, to their destination. The fee charged is a flat fee and its size is not such as to warrant the conclusion that it is unreasonable. I am thus unable to see in the enactment the violation of either the commerce or the due process or equal protection clauses of the United States Constitution.

Hence my dissent from my brethren.

Dated this 5th day of May, 1936.

LEON R. YANKWICH,
U. S. District Judge.

(Indorsed:) Filed May 5, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

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